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PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

Exhibit D Page 1

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Domestic Return Receipt

October 1, 2019

Nicholas Xanthopoulos
1726 Grand Ave. Apt 3
Saint Paul MN 55105-1813

T. Keith Fogg
Clinical Professor of Law
WilmerHale Legal Services Center of
Harvard Law School
122 Boylston St.
Jamaica Plain MA 02130-2250

Attention: FOIA Appeals
M/Stop 55202
5045 E. Butler Ave
Fresno CA 93727-5136

VIA FIRST CLASS MAIL WITH RETURN RECEIPT SERVICE

FREEDOM OF INFORMATION ACT (FOIA) IRS ADMINISTRATIVE APPEAL

Dear IRS FOIA Appeals:

By this letter, we administratively appeal the August 29, 2019 final response by David S. Nimmo, Disclosure Manager, Disclosure Office 13, Privacy, Governmental Liaison and Disclosure (PGLD) to our joint FOIA request. *See* Ex. A. That letter stated it "constitute[d] a partial denial" of our joint June 19, 2019 FOIA request with notification provided to requester Nicholas Xanthopoulos. *See* Ex. B. No PGLD notification of the denial was ever made to joint requester T. Keith Fogg, but the twenty (20)-day business deadline for the PGLD to make a determination on the request has since expired. 5 U.S.C. § 552 (a)(6)(A)(i).

Our June 19, 2019 FOIA request sought the following records:

1. An unredacted version of § 21.1.3.3 of the current Internal Revenue Manual ("IRM");
2. All final, written or recorded materials provided to IRS employees to ensure they do not request a third-party caller's return information while the taxpayer is listening;
3. All final, written or recorded materials provided to IRS employees to ensure they do not add any notes about a third-party caller's return information to a taxpayer's file;
4. All final, written or recorded materials provided to IRS employees to ensure that, in responding to a taxpayer's disclosure request, they:

Exhibit D, Page 3

- a. listen to all responsive audio recordings in their entirety and redact every portion that includes the third-party caller's return information; and
 - b. redact from all responsive documents all references to the third-party caller's return information.
5. All other final, written or recorded materials provided to IRS employees to ensure that a third-party caller's return information remains separate from the file of the taxpayer they are calling about.
 6. All final, written or recorded materials provided to IRS employees to ensure they use only a third-party caller's return information to make centralized authorization file ("CAF") inquiries through Integrated Data Retrieval System command codes CFINK, RPINK, KAFFQ and KAFTQ.

IRS basis for denial

PGLD improperly withheld agency records under Exemption (b)(7)(E). Section (b)(7)(E) exempts

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7)(E). The exemption applies only to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law...."

Argument

Exemption (b)(7)(E) is inapplicable to the redacted portions of IRM § 21.1.3.3 for at least two reasons.

First, unlike the FBI or other investigative units, the Internal Revenue Service (IRS) is a "mixed-function agency, subject to an exacting standard when it comes to the threshold requirement of Exemption 7" that information is "compiled for law enforcement purposes." *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002). In *Cox v. U.S. Dept. of Justice*, 576 F.2d 1302 (8th Cir. 1978), the Eighth Circuit explained that "Exemption (b)(7) applies only to investigatory records that are *compiled in the course of a specific investigation*." *Id.* at 1310 (emphasis added). Indeed, the IRS basis for withholding the IRM fails at this threshold stage. "The mere fact that the staff manual of a law enforcement agency deals with investigative techniques and procedures does not

1 "Disclosure" includes (but is not limited to) a request made under FOIA and the Privacy Act.

place that manual within the scope of (b)(7).” *Id.* Here, there is very good reason to believe that the IRM, which is posted on the Internet with limited redactions, does not contain information compiled in the course of a specific investigation. Rather it would seem to contain information that is general guidance for IRS customer service personnel to follow. That generality takes it out of the scope of Exemption 7(E).

Second, even assuming the IRM constituted Exemption 7 material compiled for law enforcement purposes, IRS must establish that releasing the manual could reasonably be expected to risk circumvention of the law by disclosing guidelines for law enforcement investigations or prosecutions. *PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993), or would disclose techniques and procedures for law enforcement investigations or prosecutions. 5 U.S.C. § 552(b)(7)(E). Techniques or procedures must not be well known to the public or routine, such as fingerprinting, ballistics tests, or other commonly known techniques. *Cox*, 576 F.2d at 1310, such as running a cross check of social security numbers.

Here, Exemption 7(E) seems especially implausible in context. Redacted § 21.1.3.3, which concerns “third party authentication,” is located in Part 21 of the manual. Part 21 concerns “customer account services, accounts management and compliance service operations,” *not* “criminal investigation,” which is located in Part 9. It is unlikely that § 21.1.3.3 would disclose law enforcement guidelines for prosecution or investigation, let alone techniques or procedures not already well known to the public.


In light of the above, we respectfully ask IRS FOIA Appeals to reverse the withholding decision of PGLD and order the immediate release of those records sought in our June 19, 2019 FOIA request.

If you do not understand the basis for our administrative appeal or require clarification, please contact us immediately at xant0003@gmail.com and at kfogg@law.harvard.edu.

Respectfully submitted,



Nicholas J. Xanthopoulos, Esq.



T. Keith Fogg
Harvard Clinical Professor of Law

cc: Tuan N. Samahon, Esq.

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PS Form 3800, April 2015 PSN 7530-02-000-9063 See Reverse for Instructions

Exhibit D, Page 5

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Signature Confirmation: 8. Signature Confirmation Restricted Delivery: 9. Signature Confirmation Restricted Delivery: 10. Signature Confirmation Restricted Delivery: 11. Signature Confirmation Restricted Delivery: 12. Signature Confirmation Restricted Delivery: 13. Signature Confirmation Restricted Delivery: 14. Signature Confirmation Restricted Delivery: 15. Signature Confirmation Restricted Delivery: 16. Signature Confirmation Restricted Delivery: 17. Signature Confirmation Restricted Delivery: 18. Signature Confirmation Restricted Delivery: 19. Signature Confirmation Restricted Delivery: 20. Signature Confirmation Restricted Delivery: 21. Signature Confirmation Restricted Delivery: 22. Signature Confirmation Restricted Delivery: 23. Signature Confirmation Restricted Delivery: 24. Signature Confirmation Restricted Delivery: 25. Signature Confirmation Restricted Delivery: 26. Signature Confirmation Restricted Delivery: 27. Signature Confirmation Restricted Delivery: 28. 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PS Form 3811, July 2015 PSN 7530-02-000-9063 Domestic Return Receipt

Exhibit A

Exhibit D Page 6

June 14, 2019

Internal Revenue Service
 Content Processing Unit
 Step 21
 P.O. Box 421500
 Atlanta, GA 30362-1500

VIA FIRST CLASS MAIL WITH RETURN RECEIPT SERVICE

FOIA REQUEST

Dear Internal Revenue Service ("IRS"): Freedom of Information Act ("FOIA") Officer:

Under FOIA, 5 U.S.C. § 552, Dr. Keith Fogg and Nicholas J. Nanthopoulos ("the Requesters") request these IRS agency records relating to practices used to safeguard the confidentiality of return and return information taken by the IRS from tax preparers. Specifically, we request the following categories of IRS agency records:

1. An unredacted version of § 2.01.3.3 of the current Internal Revenue Manual ("IRM")
2. All final, written or recorded materials provided to IRS employees to ensure they do not request a third-party caller's return information while the taxpayer is listening;
3. All final, written or recorded materials provided to IRS employees to ensure they do not add any notes about a third-party caller's return information to a taxpayer's file;
4. All final, written or recorded materials provided to IRS employees to ensure that, in responding to a taxpayer's disclosure request, they:
 - a. listen to all responsive audio recordings in their entirety and redact any portion that includes the third-party caller's return information; and
 - b. redact from all responsive documents all references to the third-party caller's return information.
5. All other final, written or recorded materials provided to IRS employees to ensure that a third-party caller's return information remains separate from the file of the taxpayer they are calling about;
6. All final, written or recorded materials provided to IRS employees to ensure they use only a third-party caller's return information to make centralized authorization file ("CAIF") inquiries through Integrated Data Retrieval System, summary codes CPINK, RPINK, XACTQ and XACTQ.

Fees

We respectfully request a waiver of any copy fees for this research as it is likely to contribute significantly to the public understanding of the operations and activities of government and is not primarily in our commercial interest. In no way are we authorized, we agree to pay the customary application fees charged an academic researcher affiliated with an educational institution. For fee classification status, please note that one of us, Keith Fogg, is Harvard Clinical Professor of Law and author of *Procedural Taxing*. The other one of us is Nicholas Nanthopoulos, a tax attorney and practitioner before the IRS.

¹ As IRS Case 2019-01 defines these terms.

² "Disclosure" includes but is not limited to a request made under FOIA and the Privacy Act.

Accordingly, we request classification as an educational requester for purposes of fee classification.

Please provide the requested records to us in electronic (PDF) format if readily reproducible with reasonable effort by the IRS. If necessary, we are willing to pay up to \$50 in hard copy duplication fees. In the event costs exceed this amount, please contact us for authorization to go forward with the duplication.

Exemptions and segregable portions of records

Please note that if the IRS claims any responsive record or record portion to be exempt from release under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 464 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

Moreover, please note that under the 2015 FOIA Improvement Act amendments the IRS is authorized to withhold information under an exemption only if it reasonably foresees that disclosure would harm an interest protected by the relevant exemption.

Time for response

As you are aware, the FOIA requires the IRS to make its record determination within twenty (20) business days.

If you do not understand our FOIA request or require clarification, please contact us immediately at xfogg@law.harvard.edu and xant0003@gmail.com. We look forward to receiving your determination about our requested records within twenty (20) business days.

Thank you in advance for your assistance.

Respectfully submitted,

T. Kevin Fogg
Harvard Clinical Professor of Law

Nicholas J. Northopoulos, Esq.



PRIVACY, GOVERNMENTAL
LIAISON AND DISCLOSURE

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

August 29, 2019

Nicholas Xanthopoulos
1726 Grand Ave. Apt 3
Saint Paul, MN 55105

Dear Nicholas Xanthopoulos:

This is our final response to your Freedom of Information Act (FOIA) request dated June 19, 2019 that we received on June 25, 2019.

You asked for the following items:

1. An unredacted version of § 21.1.3.3 of the current Internal Revenue Manual ("IRM");
2. All final, written or recorded materials provided to IRS employees to ensure they do not request a third-party caller's return information while the taxpayer is listening;
3. All final, written or recorded materials provided to IRS employees to ensure they do not add any notes about a third-party caller's return information to a taxpayer's file;
4. All final, written or recorded materials provided to IRS employees to ensure that, in responding to a taxpayer's disclosure request, they:
 - a. listen to all responsive audio recordings in their entirety and redact every portion that includes the third-party caller's return information; and
 - b. redact from all responsive documents all references to the third-party caller's return information.
5. All other final, written or recorded materials provided to IRS employees to ensure that a third-party caller's return information remains separate from the file of the taxpayer they are calling about.
6. All final, written or recorded materials provided to IRS employees to ensure they use only a third-party caller's return information to make centralized authorization file ("CAF") inquiries through Integrated Data Retrieval System command codes CFINK, RPINK, KAFFQ and KAFTQ.

In response to Item one of your request, the IRM 21.1.3.3 is available to the public at <https://www.irs.gov>. Any text marked with "≡≡" is Official Use Only which indicates information has been deleted and is withheld under FOIA exemption (b)(7)(E).

FOIA exemption (b)(7)(E) exempts from disclosure records or information compiled for law enforcement purposes to the extent their production would reveal:

- * Techniques and procedures for law enforcement investigations or prosecutions
- * Guidelines for law enforcement investigations or prosecutions, if release could reasonably be expected to risk circumvention of the law.

In response to items two, three, five and six, please refer to item one.

In response to item four, the IRM 11.3.13 is available to the public at: [irs.gov](https://www.irs.gov).

This constitutes a partial denial of your request.

You may contact our FOIA Public Liaison, David Nimmo, to discuss your request at:

David Nimmo
Internal Revenue Service
Disclosure Office 13
24000 Avila Road, M/S 2201
Laguna Niguel, CA 92677
949-575-6328

The FOIA Public Liaison responds to FOIA and Privacy Act requests for copies of documents maintained by the IRS. There is no provision in either Act to resolve tax, collection, or processing issues and our staff is not trained to answer questions regarding those issues. If you need assistance with tax related issues you may call the IRS toll free number at 1-800-829-1040.

If you are unable to resolve your FOIA dispute through the FOIA Public Liaison, the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's Office, offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road--OGIS
College Park, MD 20740-6001
202-741-5770
877-684-6448
ogis@nara.gov
[ogis.archives.gov](https://www.ogis.archives.gov)

You have the right to file an administrative appeal within 90 days of the date of this letter. By filing an appeal, you preserve your rights under FOIA and give the agency a chance to review and reconsider your request and the agency's decision. I've enclosed Notice 393, *Information on an IRS Determination to Withhold Records Exempt From the Freedom of Information Act - 5 U.S.C. 552*, to explain your appeal rights.

If you have any questions please call Tax Law Specialist Reinita L House ID # 1000201731, at 615-250-5413 or write to: Internal Revenue Service, Centralized Processing Unit – Stop 211, PO Box 821506, Atlanta, GA 30362. Please refer to case number F19176-0082.

Sincerely,



David S Nimmo
Disclosure Manager
Disclosure Office 13

Enclosure
Notice 393



Department of the Treasury Internal Revenue Service

Notice 393

Rev. September 2016

Information on an IRS Determination to Withhold Records Exempt From The Freedom of Information Act – 5 U.S.C. 552

Appeal Rights

You may file an appeal with the Internal Revenue Service (IRS) within 90 days after we: (1) deny you access to a record in whole or in part; (2) have made an adverse determination as to your category as a requester; (3) deny your request for a fee waiver or reduction; or (4) have advised you that no records responsive to your request exist. You may file an appeal within 10 days when a request for expedited processing has been denied.

Your appeal must be in writing, must be signed by you, and must contain:

Your name and address,

- Description of the requested records,
- Date of the request (and a copy, if possible),
- Identity of the office and contact on the response letter, and
- Date of the letter denying the request (and a copy, if possible).

Mail your appeal to:

IRS Appeals

Attention: FOIA Appeals
Mail Stop 55202
5045 E. Butler Ave.
Fresno, California 93727-5136

Judicial Review

If we deny your appeal or do not address an issue raised in your appeal within 20 days (excluding Saturdays, Sundays, or legal public holidays) after the date we receive your appeal, you may file a complaint in United States District Court in the district in which (1) you reside; (2) your principal place of business is located; (3) the records are located; or (4) the District of Columbia. A complaint may be filed within 10 days (excluding Saturdays, Sundays, or legal public holidays) after the date we receive your appeal if your appeal is from an adverse determination of a request for expedited processing. If you choose to file suit before receipt of a final determination by the Appeals office, the administrative appeals process may cease.

The rule for effecting service of judicial process upon the Internal Revenue Service is set forth in Federal Rule of Civil Procedure 4(f), in addition to service upon the

United States, as set forth in Rule 4(i)(1), service must be made upon the Internal Revenue Service by registered or certified mail as set forth in Rule 4(i)(2)(A).

The address of the Internal Revenue Service is: Internal Revenue Service, Attention OC:PA, 1111 Constitution Avenue, N.W., Washington, D.C. 20224. Exemptions The Freedom of Information Act, 5 U.S.C. 552, does not apply to matters that are:

(b)(1) • specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified under such executive order;

(b)(2) • related solely to the internal personnel rules and practices of an agency;

(b)(3) • specifically exempted from disclosure by statute (other than section 552b of this title), provided that the statute:

(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

Note: Internal Revenue Code sections 6103 and 6105 are statutes which qualify for exemption 3 treatment. Section 6103 protects the confidentiality of tax returns and information pertaining to a taxpayer collected by the IRS. Section 6105 protects information obtained from a foreign country under a tax treaty.

(b)(4) • trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) • inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) • personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) • records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication,

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(F) could reasonably be expected to endanger the life or physical safety of any individual.

(b)(6) * contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) * geological and geophysical information and data, including maps, concerning wells.

Exhibit B

Exhibit D Page 13

Internal Revenue Service
Collection Office
MEPS 420 Main Street
100 Broadway
Boston, MA 02103

United States
Department of the Treasury

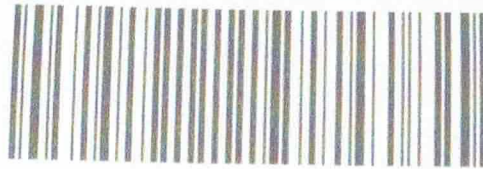


Nicholas Zanthopoulos
1726 Grand Ave, Apt 3
Saint Paul, MN 55105

Exhibit D Page 14

Nicholas J. Xanthopoulos
1726 Grand Avenue, Apt. 3
Saint Paul, MN 55105

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OCT 01, 19
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Fresno, CA 93727-5136